

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHN J. LEE)	
Claimant)	
VS.)	
)	Docket No. 216,879
DANKER ROOFING & SIDING, INC.)	
Respondent)	
AND)	
)	
KANSAS CHAMBER OF COMMERCE & INDUSTRY)	
WORKERS COMPENSATION CORPORATION)	
Insurance Carrier)	

ORDER

Claimant appealed the November 15, 1999 Award entered by Administrative Law Judge Bryce D. Benedict. The Appeals Board heard oral argument in Topeka, Kansas, on April 26, 2000.

APPEARANCES

Jeff K. Cooper of Topeka, Kansas, appeared for claimant. Jeffrey A. Chanay of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The parties stipulated that claimant injured his back while working for respondent on April 8, 1996. After finding that claimant's credibility was questionable, Judge Benedict determined that claimant had failed to make a good faith effort to find and retain employment. The Judge also determined that claimant found work with another employer, Superior Roofing, M & M, Inc. (Superior Roofing), for \$9 per hour, but quit that job for no apparent reason. Therefore, the Judge imputed \$9 per hour as claimant's post-injury wage,

which limited claimant's permanent partial general disability to his five percent functional impairment rating.

Claimant contends Judge Benedict erred. Claimant argues that (1) he made a good faith effort looking for employment; (2) the work he performed after his accident was outside his permanent work restrictions and, therefore, should not be used to impute a post-injury wage; (3) he was terminated from Superior Roofing because he was having problems with his back and, therefore, that job shouldn't be used to gauge his post-injury ability to earn wages; (4) he has a 90 percent task loss and at least a 14 percent wage loss; and (5) if a wage is imputed, the only opinion in the record is from vocational rehabilitation expert Monty Longacre who said that claimant retains the ability to earn between \$5.15 and \$5.75 per hour.

Conversely, respondent and its insurance carrier contend the Award is well supported by the evidence and should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds and concludes:

1. The Award should be affirmed. The Appeals Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with those below.
2. On April 8, 1996, claimant injured his back while working for respondent. The accident aggravated preexisting degenerative disc disease in claimant's lumbar spine. Claimant received medical treatment through October 8, 1996, which included physical therapy, work conditioning, and at least one epidural steroid injection. Claimant did not undergo surgery. But as a result of the back injury, claimant sustained a five percent whole body functional impairment.
3. After being released to return to work in September 1996, claimant did not report to work for respondent. Instead, sometime after receiving the steroid injection on October 8, 1996, claimant moved to Oklahoma, where he lived for approximately one year. While in Oklahoma, claimant exerted little effort to find work.
4. Claimant is not a good historian and, therefore, the record is not entirely clear. But sometime in 1997, claimant returned to Kansas and obtained a job with Superior Roofing, where he was hired on November 4, 1997, and worked through either May 20, 1998, or June 3, 1998. Superior Roofing terminated claimant when he stopped coming to work.
5. Claimant worked for Superior Roofing as a kettle man and laborer earning \$9 per hour. Although the job was physical in nature and required claimant to handle heavy kegs of asphalt and tear off roofing, claimant did not complain of back symptoms or tell anyone that he was unable to do the work.

6. Based upon the facts presented, the Appeals Board agrees with Judge Benedict that claimant's seven-month-long employment with Superior Roofing indicates that he retains the ability to perform physical labor and earn \$9 per hour or \$360 per week. During that seven-month period, claimant did not seek additional medical treatment for his back or exhibit or complain of back symptoms to Superior Roofing's owners. Further, the work that claimant performed for Superior Roofing substantiates the opinion of claimant's treating physician, orthopedic surgeon Dr. Phillip L. Baker, who testified that claimant could perform all of the work that he performed before the April 8, 1996 accident.

7. The Appeals Board finds that Dr. Baker's opinions of claimant's abilities are more accurate and, therefore, more persuasive than the opinions provided by Dr. Sergio Delgado. Therefore, in determining claimant's disability, Dr. Baker's opinions should be used.

8. Because claimant has an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1996 Supp. 44-510e. That statute provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk¹ and Copeland.² In Foulk, the Court of Appeals held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In Copeland, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that workers' post-injury wages should be based upon their ability rather than their actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injury.

¹ Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

² Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .³

9. The Appeals Board concludes that claimant has failed to make a good faith effort to find and retain appropriate employment. Therefore, a post-injury wage should be imputed.

10. Claimant's average weekly wage on the date of accident was \$267.29. Comparing that wage to \$360, the Appeals Board finds that claimant retains the ability to earn a wage comparable to or greater than the wage that he was earning on the date of accident. Therefore, the permanent partial general disability formula limits claimant's disability rating to his five percent functional impairment, as determined by the Judge.

AWARD

WHEREFORE, the Appeals Board affirms the November 15, 1999 Award entered by Judge Benedict.

IT IS SO ORDERED.

Dated this ____ day of May 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Topeka, KS
Jeffrey A. Chanay, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director

³ Copeland, p. 320.